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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1969

No. 1073

FORD M. MacELVAIN and ROBERT C. MacELVAIN, Individually and Doing Business as DEEP ROCK DRILLING COMPANY, Opelika, Alabama,
Petitioners,

vs.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners, Ford M. MacElvain and Robert C. MacElvain, Individually and Doing Business as Deep Rock Drilling Company, pray that a Writ of Certiorari issue to review and reverse the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above entitled case on November 4, 1969.

Jurisdiction in invoked by reason of 28 U.S.C. §1254(1).

OPINION BELOW

The written opinions of the United States District Court for the Middle District of Alabama is in the Appendix hereof, p. 22, and is cited as 299 F. Sup. 1352; the opinion of the United States Court of Appeals for the Fifth Circuit is contained herein, App. 27, and not yet reported.

JURISDICTION

This is an action by the Securities and Exchange Commission to permanently enjoin the defendants from violating Section 5 (a) and 5 (c) of the Securities Act of 1933, 15 U. S. C., Sections 77 (e) (a) (c). After a hearing, a preliminary injunction was granted on October 29, 1968 by the United States District Court for the Middle District of Alabama, and after a final hearing on February 19, 1969, a permanent injunction was issued on April 17, 1969.

An appeal was perfected to the United States Court of Appeals Fifth where, pursuant to Rule 18 of that Court, and over objections of the appellants, the case was placed on the summary docket and was heard and decided without oral argument.

QUESTIONS PRESENTED

(1) After a preliminary injunction has been granted and a hearing is to be had for a permanent injunction, may a Court constitutionally order a defendant to answer interrogatories, pursuant to R. C. P. 36 and 37, over his objection of violation of his rights under the Fifth Amendment; and can that Court at the hearing on the permanent injunction constitutionally order such defendant to take the stand as an adverse witness under R. C. P., 43 (b) despite his objections based on the Fifth Amendment?

(2) After an appeal has been legally and properly docketed in a Court of Appeals, may that Court by reason of a rule adopted, hold that such a case is not of such character as to justify oral argument, place the case on the summary docket, and refuse to allow oral argument even though petitioned so to do?

(3) Where this Court and other Circuit Courts of Appeal have held that a permanent injunction may not be issued when there is only a "mere possibility" that defendants will violate the Securities Act in the future, and there is no other evidence of the defendants intent so to do, nevertheless may such a permanent injunction be issued?

STATUTES INVOLVED

Amendment V and Amendment XIV of the Constitution of the United States, Rule 36 R. C. P. and Rule 18 of the Fifth Court of Appeals are involved.

STATEMENT OF THE CASE

The petitioners filed 4500 placer mining claims on underground waters between the three and twelve mile limit in the Santa Barbara Channel off the coast of California, under the U. S. Mining Claim Law of 1872. Each claim was filed by eight persons, being 160 acres, each person having an undivided one-eighth thereof. These claims were recorded in the Santa Barbara, California County Courthouse.

Shortly thereafter, defendants, without advice of counsel, being small businessmen, sent to customers on their mailing list an offer to purchase a 1/16 interest in each of these claims, and stated in substance that the money used there-

from would be for the purpose of litigating the claims of the buyers and sellers to clear title to the property. It was and has been freely and frankly admitted that this was an improper offer of an investment security without registration.

This was called to the attention of the defendants by the Securities and Exchange Commission, who conferred with defendants, advised of the impropriety of their act, but advised that if they were selling only real estate and made no collateral promises of any kind, they were at perfect liberty so to do, and in no violation of the law.

Having sold and delivered no deeds under the first offering, a rescission letter was sent by the defendants to everyone receiving the first letter, advising of the cancelling thereof, and offering to refund any money which may have been forwarded. The first letter was sent March 18, 1968, and the second latter May 27, 1968.

The second letter provided for selling of a one-eighth interest, thereby avoiding the fractionating of the interests, which was one of the improprieties of the first letter, and specifically stated that no collateral promises of any kind were made or implied. See S.E.C. Appendix 56(a).* Monies

---

* "If you decide to purchase a 1/8 interest, you will receive a quit-claim deed that will convey and release forever to you the same title acquired by the original co-claimer . . .

"However, it must be clearly understood that this is a speculative venture. . . . *No collateral offer, promise or assurance of any nature whatsoever is intended or implied*, and no one is authorized to make any other representation. If you are not prepared to accept the offer on this basis, you should not purchase. If you cannot afford to speculate you should not buy."

were received for the second letter and quit-claim deeds to one-eighth interests were issued.

The Securities and Exchange Commission thereafter sought a preliminary injunction, which was granted, and a hearing was set for the issuance of a permanent injunction.

The Securities and Exchange Commission, pursuant to Rules 36 and 37 of Federal Procedure, asked the defendants to answer certain interrogatories pursuant to R. C. P. 43 (b) and later asked one of the defendants to testify as an adverse witness.

Objection was made by counsel for the defendants on the ground that this was violative of the Fifth Amendment of the Constitution of the United States, in that while this was a civil proceeding, a temporary injunction had issued, and if a permanent injunction were granted and a later claim of violation of the injunction was made, these answers made to the interrogatories and answers made on the witness stand could and would be used against the deffendants in criminal contempt proceedings. This objection was overruled by the trial court and sustained by the Court of Appeals.

Counsel for the Securities and Exchange Commission was placed on the witness stand by defendants, was asked the following questions and gave the followisg answers:

> "Q. Now that is what I want to ask you; at the time you brought this suit, you thought there was a possibility they might be going to sell more, is that right?
>
> "A. Well, the—

"Q. Is that right; just yes or no, and then explain, please?

"A. That's right.

"Q. Did you have anything other than the thought that there might be *a possibility* that they would sell in the future in your contemplation when you filed this action?

"A. Well, no; . . ."

x x x

"Q. You thought that possibility existed?

"A. That's right; that is why we brought the injunction."

The defendants, in paragraph VI of their original sworn answer denied that they would continue any unlawful acts.

Therefore, the only evidence before the trial court and the Court of Appeals, by reason of which a permanent injunction was granted, was that the defendants "possibly" would engage in future unlawful acts unless enjoined. In fact, they had, after conferences with the S. E. C., stopped sending letters on August 6, 1968, nearly two months prior to the institution of the action and had never resumed that practice, nor sold another lot, and returned all mail to sender.

Hence, the question arose as to whether a permanent injunction could issue on the mere ground that there was a "possibility" of future illegal activities. The courts below hold it could and should issue.

The United States Court of Appeals Fifth Circuit adopted Rule 18 that cases they deem relatively unimportant shall be placed upon a summary docket and no oral argument to be made. Such was done with the instant case, over objection of your petitioners.

> (a) "Whenever the court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar.
>
> (b) "A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be placed on the summary calendar by the clerk, pursuant to directions from the court."

Your petitioners thereafter filed a formal petition requesting that the case be placed on the regular docket so that argument could be had, which was refused and the matter decided without oral argument.

Petitioners contend that under the Fourteenth Amendment of the Constitution of the United States, and since the Judicial Council of the U. S. has not approved of such rule for all Courts of Appeals, that this is unlawful and violates their rights.

REASONS FOR GRANTING THE WRIT

In the same district in which this case was decided, in the case of *Securities and Exchange Commission* v. *Griffin and Mateer*, the U. S. D. C. for the Southern District of Mississippi on December 20, 1968 in 296 F. Supp. 883, in an identical case, the Securities and Exchange Commission, represented by identical counsel, was refused a preliminary

and permanent injunction on the same grounds that the petitioners set forth here.

That Court cited *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 73 S. Ct. 894, 97 L. Ed. 1303, where this Court held it was the duty of the movant to satisfy the Court that some cognizable danger of recurrent violation, *which is more than a mere possibility*, must be present in order to compel further relief through the granting of an injunction.

As Judge Nixon in the Griffin case, pages 886 and 887 stated, citing *Otis & Company* v. *SEC*, 106 F. 2d 579, that the applicant for a preliminary injunction has the burden of showing a necessity for the injunctive relief, citing *Fram Corp.* v. *Boyd*, 230 F. 2d 931; *Writz* v. *G. & W. Packing Co.*, 210 F. Supp. 726; 7 Moore's *Federal Practice*, Par. 65.04 (1), pp. 1629-30.

Again, if a reasonable doubt remains as to whether injunction should be granted, a Court should deny its issuance, citing 28 Am. Jur., *Injunctions*, Sec. 25, pp. 515, 516.

That Court stated that which is the law; namely:

> "The courts have held that an injunction is authorized, but not required, where there is a reasonble likelihood or reasonable expectation that the defendant will violate the Act in the future.

This case is distinguished from *Securities Commission* v. *W. J. Howey Co., et al*, 328 U.S. 293, in that this Court specifically stated, page 297:

> "The legal issue in this case turns upon a determination of whether, under the circumstances, the land sales contract, the warranty deed and the service contract together constitute an 'investment contract' within the meaning of paragraph 2 (1).

In our instant case there was nothing other than a quit claim deed involved, and no service contract.

The strongest case in support of our position is from the Second Circuit, *S. E. C.* v. *Torr*, 87 F. 2d 446, in which it is stated:

> "Ordinarily, discontinuance of improper conduct of an action to impose legal restraint which is known or thought to be impending does not prevent an injunction, but when there is *no likelihood* of a resumption of the acts there is no purpose served by granting an injunction."

The Court further stated:

> "Where the defendants alleged violation of the statute in sale of stock took place only when they for good cause thought they were not violating the law and had been discontinued, their past conduct would not support an inference of repetition in the future, so as to warrant an injunction.
>
> "Ordinarily, it is not sufficient answer for a motion for injunction that the improper conduct repeated in the past has discontinued *when an action to impose legal restraint is known to be in the offing*, for the likelihood of a resumption of the acts is a continuing menace. But when such a likelihood does not in reason exist, *justification for such drastic action as the issuance of an injunction is lacking*, since there is in fact no lawful purpose to be served."

Also, *Wirtz* v. *Atlas Roofing Mfg. Co.*, 377 F. 2d 112, 5th CCA, in which the Court stated that where, "the likeli-

hood of future violations is possible," there should be a lack of action, and injunction refused.

In this case, counsel for the Securities and Exchange Commission stated positively that there was no fraud involved in the case.

So, this is a case in which the defendants had after conference with the Securities and Exchange Commission themselves ceased for several months all activities prior to the application for an injunction; never again engaged in them; and the only evidence to warrant the issuance of a permanent injunction is that one S. E. C. counsel believed there was a "mere possibility" that they might again in the future perform illegal acts we submit both courts below were in error.

In fact, neither the brief of the Securities Exchange Commission nor the opinion of the Fifth Court of Appeals or the District Court even touched on this the key point of the case, nor discussed it in any matter.

This decision below being in variance to the holdings and decision of this Court, and of other Courts of Appeal, therefore our petition to this Court.

In Supreme Court Practice by Stern & Gressman, page 173, it is stated:

> "The Court has, however, granted certiorari to review matters of evidence in cases where the decision below seems to it to be shockingly wrong and thus to present substantial due process questions."

This decision below being in variance to the holdings and

decisions of this Court, and of other Courts of Appeals; therefore, our petition hereon.

CONSTITUTIONAL PROVISIONS

Since the above was the key point in issue and was intended to be vigorously argued by counsel for petitioners, but since it was neither discussed by the Securities and Exchange Commission in its brief, nor touched upon by the Court of Appeals in its opinion, this alone shows that these petitioners were deprived of their rights by the Fifth Court in summarily disposing of this matter without oral argument.

As Mr. Justice Vinson said before the American Bar Association September 7, 1949,

> "The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws and treaties of the United States, and to exercise supervisory power over lower Federal courts."

We suggest that our case comes within this category.

While we realize that the Courts are extremely busy; yet, as Mr. Justice Harlan once stated at a United States Court of Appeals Fourth Conference, "many judges are just too intellectually lazy to listen to a good oral argument."

In the article by Justice Frankfurter and Dean Landis, entitled, "The Business of the Supreme Court of October Term, 1932," 47 Harvard Law Review, 245 at 249, they stated,

> "For the first time since the early years of its institution, the Court is hearing and disposing of all litigation brought before it without delay *and without sacrifice of any of the guarantees of ample argument* and due deliberation which the effective exercise of its function demands."

We trial lawyers as a group are firmly convinced that our persuasive voices as counsel well acquainted with our cases constitute a distinct advantage for our clients in persuading courts and juries to view the facts and law as we see it, and that our clients are being distinctly deprived of their constitutional rights if their lawyers are forbidden to use their golden and wisdom-carrying voices to strow their pearls of wisdom to rapt listeners.

This Court has a summary calendar for cases that do not justify extended argument, but allows oral argument of one-half hour. Rule 44 (3).

In Rule 45 (1), this Court states:

> "The Court looks with disfavor on the submission of cases on briefs, without oral argument. . . ."

Lastly, defendants were compelled over their objections to answer interrogatories and to testify as adverse witnesses for the Securities and Exchange Commission under Rules of Civil Procedure.

Although, of course, this is perfectly proper in an ordinary civil case, we submit that in an injunction case it is

improper and violative of the Fifth Amendment, because the injunction being granted, if the defendants do any act which the Court or Securities and Exchange Commission may consider violative thereof, then these very answers made in the interrogatories and on the witness stand can and will be used against them in any criminal proceedings, and they are in essence being required to testify against themselves.

The Court of Appeals brushes this lightly aside, but we submit it is a serious problem and without such testimony, the Securities and Exchange Commission could have made no case, as it produced no other witnesses at trial; and hence, it was prejudicial to defendants and being in violation of their constitutional rights, should not have been permitted.

Stern & Gressman, page 177 also state that Rule 19 recognizes the granting of certiorari in cases where the federal appellate decision, "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a course by a lower court, as to call for an exercise of this Court's power of supervision."

In *Montana* v. *Kennedy*, 366 U. S. 308, 309, and *Southern Construction Co.* v. *Pickard*, 371 U. S. 57, 60, certioari was granted, "in view of the apparent harshness of the result entailed," and "to consider the applicability of Federal Rules of Civil Procedure in the unusual circumstances detailed."

PRAYER

Therefore, these petitioners respectfully pray, because of the above reasons, that a Writ of Certiorari to the decision of the United States Court of Appeals be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, EASTERN DIVISION

Filed Oct. 31, 1968. By R. C. Dobson, Clerk

Securities and Exchange Commission, *Plaintiff*,
vs.) Civil Action No. 777-E
Ford M. MacElvain and Robert C. MacElvain, individually and doing business as Deep Rock Drilling Company, Opelika, Alabama, *Defendants*.

PRELIMINARY INJUNCTION

This is an action by the Securities and Exchange Commission filed pursuant to § 22(a) of the Securities Act of 1933, as amended [15 U. S. C. 77v(a)], against the defendants doing business as Deep Rock Drilling Company of Opelika, Lee County, Alabama. Jurisdiction of this Court in this proceeding is under § 22(a) of the Securities Act. The plaintiff asks this Court to enjoin the defendants preliminarily and, after a further hearing of this matter, permanently from using instruments of transportation or communication in interstate commerce or of the mails to offer to sell investment contracts involving claims to oil and other mineral rights in submerged lands located off the coast of Santa Barbara, California, unless and until a registration statement is in effect with the Securities and

Exchange Commission as to such securities, as required by §§ 5(a) and 5(c) of the Securities Act. In support of the complaint and motion for a preliminary injunction, the plaintiff attached thereto several affidavits and exhibits.

To the complaint, the defendants, by verified answer, deny that they are now making use of any means or instruments of transportation and communication in interstate commerce and of the mails to sell or offer securities. The defendants deny that they will in the future engage in such acts or practices; they pray that the complaint be dismissed and that no injunction issue. The defendants by cross-complaint ask this Court to enjoin the Securities and Exchange Commission, its officers and agents from hindering, harassing or embarrassing, or otherwise interfering with the defendants in dealing with their own property.

It appeals that in the early part of 1968 the United States Department of Interior leased one-half million acres of land off the shore of Santa Barbara, California, to some major oil companies. This land borders on the three-mile limit. This entire land had been claimed by the defendants Robert C. MacElvain and Ford M. MacElvain. The basis for the defendants' claim to this land is some 4,000 "claims" filed with the Santa Barbara County Recorder during February, 1968. After staking out these "claims" and operating under the name of Deep Rock Drilling Company, Opelika, Alabama, the individual defendants started offering to the general public fractional interests in these offshore oil lands. These offers were made by the use of mailing lists, and in the offers the following representations were made.

> "It is most important to note that in 1966 the 10th U. S. Circuit Court ruled that the Department of Interior *cannot* challenge mining claims staked

under the provisions of this law. (Federal Supplement, Volume 261, page 954.)

"In full compliance with this law, we staked mining claims on the entire 500,000 acres prior to the leasing. Our lawyers tell us that according to the law, we have title to the oil. Of course, our claims will be contested, and we have initiated action to validate our claims in court. It is probable that we will have to fight our case all the way to the Supreme Court.

"This is going to be an expensive court fight. To raise the money we need for expenses, we have set aside 285 of our most valuable claims — claims in those blocks which brought bids of $35 to $63 million each — and are offering 1/16 interests in each claim. The prices of these interests range from $300 to $750 depending on the bonus bid for the block in which the claim is located.

"If we are successful, each 1/16 interest should realize a payout of about 1,000-to-1. For example, a $300 interest should realize about $300,000."

The defendants now admit that such offers violated §§ 5(a) and 5(c) of the Securities and Exchange Act of 1933, as amended, in that the offers constituted an offer to sell an investment contract in exchange for money to raise legal fees that would be used to contest the Government's leasing of these lands to the major oil companies. The "expensive court fight" was, according to these first offers, to enure to the benefit of those who purchased a fractional interest in these lands.

After such offers were called to the attention of the Securities and Exchange Commission authorities, the defendants were contacted in April, 1968, a conference ensued between the defendants and their attorneys and representatives of the Commission, and it was agreed by the defendants that they would not make any further offerings of said mining claim that violated any of the provisions of the Securities and Exchange Act. Not long after this conference and agreement, the defendants resumed offering their mining claims, or fractional interest therein, to the general public. Assurances were again given by defendants that no further offerings would be made. This latest assurance was in the form of a letter-agreement dated August 6, 1968, forwarded by defendants and their attorney to the Atlanta Regional Office of the Securities and Exchange Commission. This latest assurance was not satisfactory to the Commission and the defendants were so advised. Copies of "offers of rescission" were requested by the Atlanta Office of the Commission of the defendants, but were not forthcoming. This court action was then initiated.

This Court is of the firm conclusion that the offering and sales of these mining claims in both the first and second "offerings" were clear violations of the registration requirements of §§ 5(a) and 5(c) of the Securities Act. There is no question that the second offer, reflected by letter-exhibit dated May 27, 1968, impliedly, but quite clearly and definitely, promises the prospective purchaser that, with the money received through the sale of these various interests in defendants' claims, the claim to these lands by the United State Department of Interior will be contested and that if the defendants are successful in contesting the Department of Interior's claim to these lands and the defendants continue to hold these lands, this successful court action will enure to all who purchased these fractional interests. This

is clearly an offer made through the United States mails to sell an "investment contract" without first filing with the Securities and Exchange Commission a registration statement concerning same. *S. E. C.* v. *Howey Co.*, 328 U. S. 293.

Furthermore, even if this Court is incorrect in its finding and conclusion that the defendants' second offer — the offer they are presently making — is not an "investment contract," this Court is convinced that defendants' failure to file with the Atlanta office of the Commission, as requested, "offers of rescission" concerning their first and admittedly illegal offer, together with the other evidence now before this Court, makes the issuance of a preliminary injunction against defendants necessary. It is well-settled that mere cessation of illegal activities will not, without some special showing, justify a court's refusing injunctive relief. *Wirtz* v. *Atlas Roofing Mfg. Co.*, 377 F. 2d 112, 116-117 (5th Cir. 1967); *Opelika Royal Crown Bottling Co.* v. *Goldberg*, 299 F. 2d 37, 44 (5th Cir. 1962); *United States* v. *Miller*, 323 F. 2d. 397, 402 (7th Cir. 1963); *Los Angeles Trust Deed & Mortgage Exchange* v. *Securities & Exchange Comm'n.*, 285 F. 2d 162, 180-181 (9th Cir. 1960); *Securities & Exchange Comm'n.* v. *Boren*, 283 F. 2d 312 (2nd Cir. 1960); *Interstate Commerce Comm'n.* v. *Barron Trucking Co.*, 276 F. 275 (3d Cir. 1960); *Securities & Exchange Comm'n.* v. *Culpepper*, 270 F. 2d 241, 249-250 (2nd Cir. 1959). Here, the defendants make no showing that will justify this Court's refusal to plaintiff of injunctive relief by reason of defendants' admittedly illegal activities growing out of their first "offering." The evidence here is clear, and this Court now concludes, that defendants have been and continue to be engaged in acts and practices that constitute violations of §§ 5(a) and 5(c) of the Securities Act of 1933. as amended.

Accordingly, it is the ORDER, JUDGMENT and DECREE of this Court that Ford M. MacElvain and Robert C. MacElvain, individually and doing business as Deep Rock Drilling Company, Opelika, Alabama, their agents, servants, employees, attorneys, and each of them, be and each is hereby enjoined from, directly or indirectly:

(a) Making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell, through the use or medium of any prospectus or otherwise, investment contracts involving claims to oil, gas and other mineral rights in submerged lands located off the coast of Santa Barbara, California, or any other securities, unless and until a registration statement has been filed with the Securities and Exchange Commission as to such securities;

(b) Making use of any means or instruments of transportation or communication in interstate commerce to sell such securities, through the use or medium of any prospectus or otherwise, unless and until a registration statement is in effect with the Securities and Exchange Commission as to such securities;

(c) Carrying such securities or causing them to be carried through the mails or in interstate commerce by any means or instruments of transportation for the purpose of sale or delivery after sale, unless and until a registration statement is in effect with the Securities and Exchange Commission as to such securities.

Provided, however, that nothing in the requested injunction shall apply to any security which is exempt from the provisions of Section 5 of the Securities Act of 1933, as amended.

It is further ORDERED that the relief prayed for by defendants in their cross-claim be and the same is hereby denied.

Dne, this the 31st day of October, 1968.

FRANK M. JOHNSON, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, EASTERN DIVISION

Filed April 17, 1969. By R. C. Dotson, Clerk

Securities and Exchange Commission, *Plaintiff*,

vs.) Civil Action No. 777-E

Ford M. MacElvain and Robert C. MacElvain, individually and doing business as Deep Rock Drilling Company, Opelika, Alabama, *Defendants*.

PERMANENT INJUNCTION

In this action the Securities and Exchange Commission (Commission) seeks to enjoin permanently Ford M. MacElvain and Robert C. MacElvain, individually and doing business as Deep Rock Drilling Company, from directly and indirectly making use of the means or instruments of transportation or communication in interstate commerce or of the mails, to offer or sell, or to carry or to cause to be carried for the purpose of sale or delivery after sale, certain securities described as "investment contracts" and involving claims to oil, gas or other mineral rights in submerged lands off the coast of Santa Barbara, California, or any other securities, in violation of Sections 5(a) and (c) of the Securities Act of 1933, 15 U.S.C. Sections 77e(a) and (c).

Shortly after the Commission filed its complaint, its accompanying motion for a preliminary injunction was set for a hearing. On October 31, 1968, this Court entered a preliminary injunction against defendant which is still in effect.

On February 19, 1969, a hearing was held to determine whether a permanent injunction should be granted. This cause is now submitted on that issue; the submission includes testimony adduced at the February 19 hearing, defendants' answers to request for admissions, and exhibits and affidavits previously on file in this Court.

It appears that on or about March 28, 1968, defendants first offered to the public certain underwater mining claims located off the coast of Santa Barbara, California. Defendants' claim to this 500,000 acre tract is by virtue of defendants and six others having filed some 4,000 claims under the provisions of the United States Mining Claim Law of 1872. In early 1968 the United States Department of the Interior leased this land to some major oil companies. Since defendants' claims were filed prior to the leasing, they assert that the Department of Interior has "jumped" their claims.

This first offering was stated to be for the purpose of raising money for an expensive court fight. To this end defendants offered to sell one-sixteenth interest in 285 of the best of the 4,000 claims. The offer made clear that the fight would inure to the benefit of purchasers of the claims. Defendants have not contested that the first offering violated Sections 5(a) and 5(c) of the Securities and Exchange Act of 1933, as amended, in that the offers constituted an offer to sell an investment contract without registering the offering as required by the Act.

The March 28, 1968, offering came to the attention of the Commission, and the Commission put the defendants on notice of the registration requirements of the Act. As a result, correspondence was exchanged and a conference was held concerning the offering. After the conference counsel

for the defendants wrote a letter to the chief counsel for the Commission in Washington, D. C., seeking information concerning certain exemptions from the registration provisions of the Act. Without waiting for a reply to this letter, the defendant commenced a second offering of these mining claims on May 27, 1968. The second offer differed from the first in that the defendants offered one-eighth interests rather than one-sixteenth undivided interest, and the offering letter contained a disclaimer to the effect that no collateral promise was being made to perfect title to the properties.

Defendants have contended and continue to contend that the second offering does not involve a "security" within the meaning of Section 2(1) of the Act, but rather, since no one is fractionating an undivided interest in the mining claims, the transaction should be seen as simply an offer to sell real estate. Defendants rely upon *Lynn* v. *Caraway*, 252 F. Supp. 858 (W.D. La. 1966) and *Graham* v. *Clark*, 332 F. 2d 155 (6th Cir. 1964). These cases hold that if one transfers outright an entire interest in an oil and gas lease, no sale of a "security" is involved. However, in the order granting a preliminary injunction, this Court held that the second offer impliedly, but quite clearly and definitely, promised the prospective purchaser that the money received through the sale of the land would be used to contest the Department of Interior's title and that the contest, if successful, would issue to the benefit of all purchasers. Nothing submitted to the Court subsequent to that order suggests that that conclusion was erroneous. The finding of an implied promise brings the second offering well within the definition of an "investment contract" set forth by the Supreme Court in the leading case of *Securities and Exchange Commission* v. *W. J. Howey Co.*, 328 U. S. 293 (1946). As *Lynn* v. *Caraway*, supra, and *Graham* v.

Clark, supra, did not involve an implied promise or the creation of an expectation of profits from the efforts of a third party, they are in apposite here.

Nor have defendants succeeded in altering this Court's conclusion that injunctive relief is here appropriate. The Commission is charged with the difficult and delicate task of protecting the investing public. Here, the defendants' first offering was concededly illegal. The Commission's efforts to deal with the problems apparent in the second offering on a voluntary and informal basis were met with equivocation and something less than full cooperation. This second offering has been subsequently ruled illegal. As the Second Circuit stated in *Securities and Exchange Commission* v. *Culpepper*, 270 F. 2d 241, 250 (2d Cir. 1959):

> "Surely the Commission should not be required to keep these appellants under surveillance and to bring a subsequent injunction action if they commence again to sell 'tainted stock'."

See also *Opelika Royal Crown Bottling Co.* v. *Goldberg*, 299 F. 2d 37, 44 (5th Cir. 1962).

Accordingly, it is the ORDER, JUDGMENT and DECREE of this Court that Ford M. MacElvain and Robert C. MacElvain, individually and doing business as Deep Rock Drilling Company, Opelika, Alabama, their agents, servants, employees, attorneys, and each of them, be and each is hereby permanently enjoined from, directly or indirectly:

> (a) Making use of any means or instruments of transportation or communication in interstate commerce or of the mails, to offer to sell, through the use or medium of any prospectus or otherwise, investment contracts involving claims to oil, gas and other mineral rights in submerged lands located off the coast of Santa Barbara, California, or any

other securities, unless and until a registration statement has been filed with the Securities and Exchange Commission as to such securities;

(b) Making use of any means or instruments of transportation or communication in interstate commerce to sell such securities, through the use or medium of any prospectus or otherwise, unless and until a registration statement is in effect with the Securities and Exchange Commission as to such securities;

(c) Carrying such securities or causing them to be carried through the mails or in interstate commerce by any means or instruments of transportation for the purpose of sale or delivery after sale, unless and until a registration statement is in effect with the Securities and Exchange Commission as to such securities.

Provided, however, that nothing in the requested injunction shall apply to any security which is exempt from the provisions of Section 5 of the Securities Act of 1933, as amended.

Done, this the 17th day of April, 1969.

FRANK M. JOHNSON, JR.
United States District Judge

(SEAL)

Attest: A True Copy.
Certified to April 17, 1969.
R. C. Dobson,
Clerk, U. S. District Court,
Middle District of Alabama.

By Jane P. Gordon, Deputy Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 28094 Summary Calendar

Securities and Exchange Commission, *Plaintiff-Appellee*,

versus

Ford M. MacElvain and Robert C. MacElvain, Individually and Doing Business as Deep Rock Drilling Company, Opelika, Alabama, *Defendants-Appellants*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

(November 4, 1969)

Before GEWIN, DYER and CARSWELL, Circuit Judges.

CARSWELL, Circuit Judge: In this action, appeallants Ford M. MacElvain and Robert C. MacElvain, individually and doing business as Deep Rock Drilling Company, seek reversal of an order by the United States District Court for the Middle District of Alabama permanently enjoining them from violating §§ 5(a) and 5(c) of the Securities Act of 1933, 15 U.S.C. §§ 77(e) (a) and (c).*

In the early part of 1968, the MacElvain brothers, appellants herein, along with six others, each person having an undivided one-eighth interest, filed over 4,000 claims under

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* Pursuant to Rule 18 of the Rules of this Court. we have concluded on the merits that this case is of such character as not to justify oral argument. Accordingly, the Clerk has been directed to place the case on Summary Calendar and to notify the parties in writing. See *Murphy* v. *Houma Well Service*. 409 F. 2d 804, Part I (5th Cir. 1969).

the provisions of the United States Mining Claim Law of 1872 to a 500,000 acre tract of underwater grounds off the coast of Santa Barbara, California. Shortly thereafter, the United States Department of the Interior leased this land to certain oil companies.

On or about March 28, 1968, appellants started offering to the general public one-sixteenth interest in 285 of these underwater mining claims. In this first offering, it was represented that the money raised from the sale of these interests was to be used for an "expensive court fight" to validate appellants' claim to the oil. It was made clear that the "court fight" would inure to the benefit of purchasers of the claim. The offer stated, "If we are successful, each 1/16 interest should realize a payout of about 1,000-to-1. For example, a $300 interest should realize about $300,000."

On April 26, 1968, the Securities and Exchange Commission notified appellants that their initial offering appeared to be a "security" within the meaning of the Securities Act and informed them of the registration requirements of the Act. After a conference between appellants and representatives of the Commission, it was agreed by appellants that they would not continue further offerings of the mining claims in violation of federal securities laws. Shortly after this same conference, appellants wrote a letter to the chief counsel for the Commission in Washington, D. C., inquiring whether one of the several exemptions from the registration requirements of the Act was available. Without waiting for a reply to this letter, appellants began a second offering of these mining claims on May 27, 1968.

This second offer differed from the first in that appellants offered one-eighth undivided interests in lieu of one-sixteenth

undivided interests, and the letter contained a paragraph disclaiming any "collateral offer, promise or assurance of any nature whatsoever." The letter, however, indicated the basis upon which title was claimed, the contested nature of the title being sold, and alluded to the necessity of litigating title. And, it was stated that "on the average, each 1/8 represents acreage that should bring a total bonus and royalty of MORE THAN $300,000!"

The Commission learned of this second offering, and a second conference was held whereupon a representative of the Commission notified appellants that it appeared that they were still offering securities, in the form of "investment contract." Appellants assured the Commission that they would make no further offerings to sell fractional interests in their claims. They contended, however, that the second offer was simply an attempt to sell real estate or a claim in real estate. The Commission requested a copy of the rescission letter which appellants claimed to have sent to the purchasers of the claims in the first offering, and instructed the appellants to send offers of rescission to purchasers of the second offering. After two months had elapsed without response from appellants, the Securities and Exchange Commission commenced this action for an injunction on October 8, 1968.

On October 31, 1968, the District Court found that both the first and second offerings were clear violations of the registration requirements of §§ 5(a) and 5(c) of the Securities Act, and a preliminary injunction was ordered. On this same date, appellants forwarded to the Court the letter which purported to rescind the first offering. No rescession letter was offered concerning the second offering. On February 19, 1969, a hearing was had to determine whether a permanent injunction should be granted.

In its order issuing the permanent injunction, the District Judge found that nothing submitted to the court subsequent to the order preliminarily enjoining appellants suggested that his determination regarding the second offering was erroneous, nor had appellants succeeded in altering the court's conclusion that injunctive relief was appropriate. The trial judge stated that:

> "Here, the defendant's first offering was concededly illegal. The Commission's efforts to deal with the problems apparent in the second offering on a voluntary and informed basis were met with equivocation and something less than full cooperation. This second offering has been subsequently ruled illegal. As the Second Circuit stated in *Securities and Exchange Commission* v. *Culpepper*, 270 F. 2d 241, 250 (2nd Cir. 1959):
>
> 'Surely the Commission should not be required to keep these appellants under surveillance and to bring a subsequent action if they commence again to sell "tainted stock." ' "

Appellant now brings this appeal upon three issues: (1) Was the second letter sent by appellants an investment contract under law?; (2) Should the lower court have awarded a permanent injunction against appellants?; and (3) Were appellants' constitutional rights violated when the trial court required them to submit written answers to requests for admissions propounded by appellee and when one appellant was required to testify as an adverse witness?

An investment contract has been described in the case of *Securities and Exchange Commission* v. *W. J. Howey Co.*, 328 U. S. 293 (1946), as:

> "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or third party. . ." 328 U. S. at 298-299.
>
> "The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." 328 U. S. at 301.

In light of this definition and other cases repeatedly holding that the term "security" is to be broadly construed, *Tcherepnin* v. *Knight*, 389 U.S. 332 (1967), a review of the record convinces us that the District Court correctly concluded that "the finding of an implied promise brings the second offering well within the definition of an investment contract."

Appellants rely upon their disclaimer in the second offering to the effect that no collateral promises were being made. This reliance is misplaced for the reason that the interrelationship between the two offerings cannot be ignored. Appellant Ford MacElvain testified that the second offering letter was sent along with the letter rescinding the first offer to all purchasers of claims who bought as a result of the first offer. The rescission letter itself noted that the revised offering was enclosed. The District Court did not err in its finding that the second offer impliedly, but clearly and definitely, promised the purchaser that the United States Department of the Interior's claim to the land would be contested by appellants with the money received from the purchasers, and that successful court action would inure to all purchasers. This was clearly an offer to sell an investment contract without first filing a registration statement with the Securities and Exchange Commission.

Appellants' next specification of error regarding the District Court's propriety in granting a permanent injunction it without merit. This Court has long recognized that the granting or denying of injunctive relief rests within the sound discretion of the trial court and that the exercise of this discretion will not be disturbed unless there has been a clear abuse of it. *Frostie Company* v. *Dr. Pepper Company*, 361 F. ed 124, 127 (5th Cir., 1966)*, The District Court did not abuse this discretion when it entered a permanent injunction. The record shows that appellants have continually attempted to circumvent the registration requirements rather than comply with them. They have always maintained and continue to contend that the second offering does not involve a "security." It has been held that in a suit for injunction, a defendant's assertion of the correctness of his behavior is a ground for restraint. *Walling* v. *Helmerick & Payne, Inc.*, 323 U.S. 37, 43 (1944). Even had appellants complied with the Commission's requests respecting the rescission letters, rather than meeting these requests, as found by the District Court, "with equivocation and something less than full cooperation," it is established that the court's power to grant injunctive relief survives discontinuance of the illegal conduct and can even be utilized without a showing of past wrongs. *United States* v. *W. T. Grant Co.*, 345 U.S. 639, 633 (1953); *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944); *Walling* v. *Helmerick & Payne, Inc.*, supra at 43. With these principles in mind, and upon a review of the

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* Accord *United States* v. *Board of Education*, 332 F. 2d 40, 46 (5th Cir. 1964); *J. M. Fields, Inc.* v. *Kroger Co.*, 330 F. 2d 686, 687 (5th Cir. 1964); *United States* v. *Dogan*, 314 F. 2d 767, 772 (5th Cir. 1963); *Detroit Football Co.* v. *Robinson*, 283 F. 2d 657, 659 (5th Cir. 1960); *Reliable Transfer Co.* v. *Blanchard*, 145 F. 2d 551, 552 (5th Cir. 1944).

entire record, it cannot be said that the District Court abused its discretion in ordering a permanent injunction against appellants.

Finally, appellants contend that their Fifth Amendment rights were violated when the District judge required them to submit written answers to requests for admissions, and that appellant Ford MacElvain's rights were violated when he was required to take the stand as an adverse witness during the hearing. The trial court did not abuse its discretion in these matters. An injunctive action is purely a civil proceeding and, as such, the Federal Rules of Civil Procedure regarding discovery through requests for admissions (Rules 36 and 37) and calling an adverse witness to the stand (Rule 43(b)) are clearly applicable. Before testifying, appellant Ford MacElvain was warned of his constitutional right against self-incrimination. Appellant never invoked this right. Furthermore, appellant's own counsel called him to the stand in support of his defense. Thus, it cannot be claimed that appellant Ford MacElvain was prejudiced by being required to testify.

We accordingly affirm the order of the court below that appellants be permanently enjoined from violations of the registration provisions of the Securities Act.

AFFIRMED.

In the Supreme Court of the United States

OCTOBER TERM, 1969

FORD M. MACELVAIN, ET AL., PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

ERWIN N. GRISWOLD,
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PHILIP A. LOOMIS, JR.,
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DAVID FERBER,
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